IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7133 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANBI NARSI RATNA BAMBHROLIA

Versus

DIST COLLECTOR

Appearance:

MR BJ JADEJA for Petitioner

Mr S P Dave, AGP for Respondent No. 1

MR BB PARMAR for Respondent No. 2, 3, 4

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 03/03/2000

ORAL JUDGEMENT

This is a petition filed by the petitioner for appropriate writ, order or direction quashing and setting aside the order passed by the Collector and confirmed by the Addl.Chief Secretary placed at Annexure 'A' and 'B'

to the petition.

The facts may be briefly stated as follows:

2. Respondents No.2, 3, and 4 belong to Scheduled Tribe and they are residents of village Madhavpur in Talala Taluka of Junagadh District. Agricultural land bearing Survey no.81/1/1 admeasuring As.3-10 Gunthas situated in the above village belonged to respondents No.2,3 and 4. The petitioner agreed to purchase the said land from the respondents for a sum of Rs.18,000/- and an agreement was entered into on 15.5.1980 for the said amount. The petitioner paid a sum of Rs.10,000/- to respondents No.2,3 and 4. At that time, the remaining amount was to be paid at the time of effecting the registered sale deed. After the agreement to sale dated 15.5.1980, regular sale deed was executed and registered on 1.5.1981.

3. In the meantime, the State Government amended provisions contained in the Bombay Land Revenue Code (hereinafter referred to as 'the Code'). Section 73-AA was added to the said Code which is reproduced as follows:

"73-AA. Restriction on transfer of occupanices of tribals to tribals or non-tribals -

(1) Nothwithstanding anything contained in Section 73, an occupancy of a person belonging to any of the Scheduled Tribes shall not be transferred to any person without the previous sanction of the Collector."

xxxx xxxx xxxx

It seems that it was brought to the notice of the Collector, Junagadh that in view of the aforesaid amendment to the said Code, sale could not be effected in respect of the land belonging to a person belonging to Scheduled Tribe. Therefore, notice was issued and served upon the present petitioner. Thereafter, the Collector passed an order dated 16.6.1987 placed at page 11 of the petition, holding that the said sale deed in favour of the petitioner was illegal in view of the provisions contained in Section 73-AA of the said Code. The Collector also directed that the present petitioner should pay three times of the amount of value of the said land. He further directed that the possession of the said land be returned to respondents No.2,3 and 4.

4. The petitioner carried the said matter in Appeal before the Additional Chief Secretary, Revenue Department (Appeals). The said matter was heard by the said authority. He dismissed the said appeal of the petitioner. However, there was some modification with respect to the amount to be recovered from the petitioner and with respect to the possession of the land i.e. the land should not be handed over directly to the respondents No.2,3 and 4, but it should be taken over by the State. The said order of the Addl.Chief Secretary has been placed at page 15.

5. Feeling aggrieved by the said orders of the Collector as well as the Addl.Chief Secretary, the petitioner has preferred this petition under Article 227 of the Constitution of India. The petitioner has mainly contended that the Collector as well as the State Government not having taken up the matter within reasonable period and, therefore, the orders passed by them should be quashed. It is further contended that the sale in question is not illegal even despite the amendment to the said Code. It is, therefore, contended that the said orders may be quashed and set aside.

6. I have heard M/s B J Jadeja, Advocate appearing for the petitioner and Mr S P Dave, Advocate appearing for respondent No.1. None appears for respondents No.2, 3 and 4.

7. So far as the first contention is concerned, the petitioner has very vehemently contended that the sale was effected on 1.5.1981 and the entry was posted in the revenue records and yet the proceedings were commenced by the Collector in 1987. Therefore, his conention is that the matter has been taken up by the Collector very late after about 5 to 6 years, and hence there is unreasonable and inordinate delay on the part of the Collector in taking up the matter against the petitioner. It is further contended that since the matter has not been taken up by the Collector within reasonable period, the said action should be quashed.

8. In support of the said contention, Mr Jadeja has relied upon a decision in the case of State of Gujarat v. Patel Raghav Natha, reported in AIR 1969 SC 1297. There it has been positively held that power of the Commissioner to revise order made under section 65 and 211 of the said Code must be exercised within a few months. Therefore, if the powers are exercised after inordinate delay or undue delay, then such proceedings or orders being the consequences of such proceedings have to

be quashed. In the present case, though the sale was effected on 1.5.81 and the mutation entry was posed in 1982, the proceedings have been taken up in 1987. This clearly indicates that there was inordinate delay on the part of the first respondent in taking up the matter and proceeding against the petitioner. It is noted that the said delay has not at all been explained by the respondents at any point of time. Since there is no explanation for the said inordinate delay, the principles enunciated in the aforesaid decision of the Supreme Court will come into play to the rescue of the petitioner. It, therefore, cannot be said that the first respondent has acted promptly or within the reasonable time and since the proceedings have not been taken up within the reasonable time, they are required to be quashed.

9. Another contention raised on behalf of the petitioner by Mr B J Jadeja is that the aforesaid amendment was brought into force on 1.2.1981 and the sale has been effected on 1.5.1981 hence there was a gap of 3 months only. It is true that the petitioner as well as respondents No.2, 3 and 4 must not have come to know about the amendment in the said provision but ignorance of law is not an excuse and therefore, simply because there was a little gap of three months between the date of amendment and the date of sale, it cannot be said that the sale can be saved on account of the said contention. Therefore, this contention requires to be rejected.

10. It is next contended that on account of the agreement to sale dated 15.5.1980, the petitioner had partly paid the consideration and had taken over possession of the suit land at that time. This fact has not been disputed by the respondents. In the affidavit filed by respondent No.4-Siddi Uka Rehman, this fact has not been disputed. On the contrary, the position has been admitted. Hence it is clear that since May 1980, the petitioner was in possession of the land in question.

11. It is necessary to examine provisions of Section 73-AA of the Code as said above. What is prohibited is the transfer of any occupancy of a person belonging to Scheduled Tribe. Even if we take that respondents No.2, 3 and 4 belong to Scheduled Tribe, the question as to whether the occupancy is continued to be of respondents No.2,3 and 4 as on the date of sale. Therefore, the definition of 'occupancy' will have to be considered. The word, "occupancy" is defined in sub-clause (17) of Section 3 of the Code. It says that "occupancy" means a portion of land held by an occupant. Therefore, definition of "occupant" will have to be considered.

Sub-section (16) of Section 3 says that "occupant" means a holder in actual possession of unalienated land, other than a tenant, provided that where the holder in actual possession is a tenant, the landlord or superior landlord, as the case may be shall be deemed to be the 'occupant'. This means, a holder in actual possession of unalienated land will be treated to be an "occupant" for the purpose of this definition.

12. Sub-section (11) of Section 3 says that "to hold land" or to be a "land holder", or "holder" of land means to be lawfully in possession of land, whether such possession is actual or not. It means that a person in lawful possession is considered to be the land holder or holder. In the present case, it is admitted fact that on the strength of agreement to sale dated 15.5.1980, the petitioner was put in possession. This was under agreement and on part payment of the consideration. Therefore, the petitioner was in lawful possession of the suit land. In that event, respondents No.2, 3, and 4 were not the persons in possession thereof from 15.5.1980. In other words, on the date of amendment as well as on the date on which the sale deed was effected, respondents No. 2, 3 and 4 were not the occupants of the suit land. Therefore, they were not the holders of the land in question, i.e. the petitioner was in lawful possession of the suit land and, therefore, he was the holder of the land within the meaning of Section 3(11) of the Code. Consequently, he would be treated to be occupant as defined in Section 3(16) of the Code and the land held by the petitioner should be treated to be the land in his occupancy within the meaning of Section 3(17) of the Code. In that event, respondents No.2, 3 and 4 cannot not be treated to be land holder. Therefore, they cannot be treated as "occupant" and the land cannot be treated to be the land under their occupancy. In that event, it cannot be said that the occupancy has been transferred after the amendment of Section 73-AA on 1.2.1981. In that view of the matter, the said transaction cannot be treated to be illegal under Section 73-AA of the Code.

13. Mr B J Jadeja, learned Advocate for the petitioner has vehemently contended that the present petitioner was already the occupant of the land in question at the time when the said amendment was brought into force. Therefore, there is no question of transfer of holding or occupancy after the amendment in the said Code. These arguments made were not answered by Mr S P Dave, learned AGP appearing for the respondent.

14. It is next contended that before passing the orders, no reasonable enquiry has been conducted by the respondent Collector. He appears to have depended upon orders from the Government. Therefore, according to the learned Advocate for the petitioner, there is non-application of mind on the part of the Collector who is respondent before the Court. Simply because there are some instructions from the Government to make enquiry and if the enquiry is conducted at the instance of the Government by the Collector, it cannot be said that it is a matter of non-application of mind. The matter may be brought to the notice of the Collector either by the subordinate or by the higher-ups. At the same time, it cannot be said that no enquiry was made. Relevant facts were collected and even the present petitioner was heard. In fact the present petitioner appears to have been represented through his Advocate also. It, therefore, cannot be said that reasonable opportunity was not afforded to the petitioner of being heard. Therefore, this contention cannot come to the rescue of the petitioner.

15. Mr B J Jadeja, learned Advocate for the petitioner has also argued that as per page 13 of the petition, possession of the petitioner in respect of the suit land has been proved and admitted. There is no serious dispute regarding possession. In fact the petitioner is found to be in possession on the strength of the sale deed in his favour. Even learned AGP has also not disputed this possession. Therefore, it is not very much necessary to go into the said aspect of the case. On the other hand, Mr SP Dave, learned AGP contended that initially there was only agreement to sale in favour of the petitioner but that would not transfer title of the property. There is no dispute about that technical aspect of the matter. Here, through agreement to sale, the petitioner was put in possession of the disputed land and thereafter, the nature of the legal aspect has been changed as referred to hereinabove. In that view of the matter, even if it is taken as agreement to sale, it would not transfer title of land on record. When the petitioner was put in possession, he was the occupant and holder of the land and consequently he was enjoying occupancy in respect of the land in dispute which is a material aspect of the case.

16. In the aforesaid view of the matter, the impugned orders of the respondent suffer from illegality as indicated above and consequently the said orders cannot be upheld for any reason.

17. In the case of Lajjashanker Keshavji Joshi v. State of Gujarat, reported in 26 (2) GLR 658, this Court has considered the term "transfer" used in Section 8 of the Gujarat Agricultural Land Ceiling Act, 1951 and for doing so, the definition of words "to hold land" as have been defined in Section 2(15) of the Gujarat Agricultural Land Ceiling Act have been reproduced. There the meaning is given as follows:

> "2(15) "to hold land" with its grammatical variations and cognate expression means to be lawfully in actual possession of land as owner or tenant, as the case may be -
>
> Provided that in the case of land mortgaged with possession:
>
> (a) if it is not in the actual possession of the tenant, the mortgager shall be deemed to hold it as owner and
>
> (b) if it is in the actual possession of a person as a tenant thereof, such person shall be deemed to hold it as a tenant".

The above section makes it clear that a person must be in actual lawful possession of the land either as an owner of the land or a tenant. This Court further observed that under the provisions of Transfer of Property Act, immoveable property can be transferred by sale, mortgage, lease, exchange or by way of gift and there is no other mode of transfer of immoveable property prescribed under the Transfer of Property Act. This Court further observed that Section 8 of the above Act has an extended scope and apart from the sale, gift, mortgage, exchange or partition if the property is transferred by surrender or otherwise, it would also be a transfer, meaning thereby that legislature has given wider meaning to the term 'transfer'. This shows that the ordinary meaning of a word may not be a sufficient meaning thereof. In all aspects, each word has to be interpreted in light of background of the facts and circumstances of each case. Therefore, the words, "occupancy", "occupant" etc. are required to be read in light of the provisions made in the Code and if that is done, it is very clear that the petitioner was already enjoying "occupancy" before the amendment was made in the said Code and consequently the said sale in favour of the petitioner cannot be hit by the amended provisions of the said Code.

18. In view of the above, the petitioner is right

when he claims that the impugned orders passed by the respondents are illegal. Accordingly this petition succeeds. The petitioner is entitled to the reliefs claims in the petition. The petition is, therefore, allowed. The orders passed by the respondent-Collector and Chief Additional Secretary at Annexures 'A' and 'B' respectively are hereby quashed and set aside. Rule made absolute to the above extent. In the facts and circumstances, there shall be no order as to costs.

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msp.